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Utah Supreme Court

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UTAH SUPREME COURT

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BRIEF

KEY NO.

13552

DEC 6 1975

COURT

OF THE STATE OF

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

JOHN M. RAPP, dba RAPP
CONSTRUCTION COMPANY,
Plaintiff-Appellant,

vs.

SALT LAKE CITY, a municipal
corporation; and MARRIOTT
CORPORATION, a corporation,
Defendants-Respondents.

Case No.
13552

BRIEF OF APPELLANT

Appeal from the District Court of Salt Lake County,
State of Utah
Honorable Ernest F. Baldwin, Presiding

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FILED

APR 10 1974

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN M. RAPP, dba RAPP
CONSTRUCTION COMPANY,
Plaintiff-Appellant,

vs.

SALT LAKE CITY, a municipal
corporation; and MARRIOTT
CORPORATION, a corporation,
Defendants-Respondents.

} Case No.
13552

BRIEF OF APPELLANT

NATURE OF CASE

This was an action by an unsuccessful bidder to recover costs of preparing its bid.

DISPOSITION OF CASE IN TRIAL COURT

The court dismissed the action on motions without an evidentiary hearing.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant seeks reversal and remand for trial.

STATEMENT OF FACTS

This case involves the bidding procedures followed by Salt Lake City in connection with a project for the construction and leasing of an "in-flight kitchen" at Salt Lake International Airport. The facts are as set out in the pleadings and affidavits.

On or about November 30, 1972, the city entered into a "Lease and Concession Agreement" with Airline Foods, Inc., which is a subsidiary of defendant Marriott Corporation.

Under the agreement Airline Foods leased from Salt Lake City real property at the Salt Lake International airport and was to operate the in-flight catering kitchen. The property involved was then vacant, but under the terms of the agreement Salt Lake City was to construct "at its expense" the necessary buildings for the kitchen, in accordance with plans and specifications prepared by Airline Foods. But the city's expense was limited by the following provision:

"Lessor shall pay for the 'cost of the project.' Provided that in the event the 'cost of the project' shall exceed the total sum of Five Hundred Fifty Thousand (\$550,000) Dollars, the lessee shall promptly pay lessor upon demand the amount by

which the 'cost of the project' exceeds such sum and which is the result of change orders and other amendments and supplements to the construction contract or contracts issued or executed by lessor at the written request of and approved by lessee.
* * *"

On or about May 1, 1973, Salt Lake City sent to various construction contractors invitations for bids on the project. In response to the invitation for bid Rapp Construction Company submitted a bid for \$648,888.00, compared with a preliminary estimate of \$650,000.00 by Salt Lake City.

The obligations of Airline Foods under the lease and concession agreements had been guaranteed by defendant Marriott Corporation, and the concession and lease agreement contained an express provision that defendant Marriott Corporation would be permitted to bid on all or any portion of the construction work. Although Marriott Corporation did not bid directly on the construction project it submitted a bid through J.J.G. Construction Company, a wholly owned subsidiary, in the amount of \$540,000.00. Over the protest of Rapp, the second lowest bidder, the contract was awarded to J.J.G. Construction Company.

There was nothing in the bidding documents sent out by Salt Lake City to give contractors notice of the agreement between Salt Lake City and Marriott Corporation and, for all the contractors knew, they were bidding on an equal basis with all other contractors who were being asked to submit bids.

It has been the consistent practice of the Salt Lake City Engineer's Office to publish a request for bids on all public improvement projects estimated to cost \$12,000.00 or more, regardless of whether the funds were general city funds or special city funds.

A comparison of the Salt Lake City's estimated cost of the project, the bid of J.J.G. Construction, and the other bids, suggests that the invitation for bids in this case was not an attempt to obtain competitive prices in the public interest, but was for the purpose of assisting Airline Foods in limiting its liability under the provision of the contract which required Salt Lake City to pay the cost of the project only up to \$550,000.00. The amount of J.J.G.'s bid being just \$10,000.00 below the liability limit and \$110,000.00 below the estimate, the invitation for bids must have been issued for the purpose of giving an appearance that the competitive bidding was in the interest of Salt Lake City.

Particular corporate entities being disregarded, the lessee and lessor entered into a construction contract for a project the plans and specifications for which were prepared by the lessee. Change orders had to be approved by the city and the lessee.

There was no way in which other bidders could compete on an equal basis with J.J.G. Construction Company, but they were given no intimation of their competitive disadvantage. Because of the appearance of legitimacy, the other bidders went to great expense in preparing and submitting bids on the project. It is his

expense in the preparation of a bid that the plaintiff seeks to recover in this action.

The court however summarily dismissed the action without hearing evidence.

I

IN ADVERTISING FOR BIDS A MUNICIPALITY WARRANTS THAT BIDS ARE SOUGHT IN GOOD FAITH AND FOR PUBLIC PURPOSES.

This case is one of first impression in Utah, but is a first cousin of cases holding that public bodies may be held liable for expenses if the bidding procedure is tainted.

The doctrine that advertising for bids obligates the advertising party to fairly consider all bids is enunciated in the landmark case of *Heyer Products Co. v. United States*, 140 F.Supp. 409, 135 Ct.Cl. 63 (1956) and has been faithfully adhered to by the U.S. Court of Claims ever since.

The Court of Appeals for the District of Columbia Circuit has adopted the principle that a prima facie showing of arbitrary or capricious consideration of bids by an agency will entitle an unsuccessful bidder to a hearing. *Scanwell Laboratories v. Shaffer*, 137 U.S. App.D.C. 371, 424 F.2d 859 (1970) ; *Wheelabrator Corp. v. Cla-fee*, 147 U.S. App. D.C. 238, 455 F.2d 1306 (1971) ; *M. Steinthal & Co. v. Seamans*, 147 U.S. App. D.C. 221,

455 F.2d 1289 (1971); *Blackhawk Heating & Plumbing Co. v. Driver*, 140 U.S. App. D.C. 31, 433 F.2d 1137 (1970); *Ballerina Pen Co. v. Kunzig*, 140 U.S.App. D.C. 98, 28 L.Ed.2d 234, 433 F.2d 1204 (1970), cert. denied, 401 U.S. 950, 91 S.Ct. 1186 (1971); *Simpson Electric Co. v. Seamans*, 317 F. Supp. 684 (D.D.C. 1970); *Keco Industries v. Laird*, 318 F.Supp. 1361 (D.D.C. 1970). The *Scanwell* court noted that even in the absence of a statute providing for it, a showing of arbitrariness will entitle plaintiff to a hearing.

The Court of Claims has incorporated the language of *Scanwell* in its criteria for determining fairness in considering bids. *Keco Industries v. United States*, 428 F.2d 1233, 192 Ct.Cl. 773 (1970). A bidder who establishes that the government has acted arbitrarily and capriciously in awarding a bid to another is entitled to recover costs incurred in preparing his bid.

The *Heyer* case involved a situation where the contract was awarded to a contractor whose bid was higher than those of six other bidders. The plaintiff alleged that he was the lowest responsible bidder, and that the Ordnance Tank Automotive Center acted arbitrarily and capriciously in awarding a contract to supply circuit testers to another. The plaintiff alleged that the following statute was violated:

“All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be

most advantageous to the Government, price and other factors considered: *Provided, that all bids may be rejected* when the agency head determines that it is in the public interest so to do." 41 U.S.C.A. §152. [Emphasis added]

The court went on to point out that the public only rather than an unsuccessful bidder had standing to contest the award of the contract. But this does not leave the wronged bidder without a remedy.

The Court said:

"The advertisement for bids was, of course, a request for offers to supply the things the Ordnance Department wanted. It could accept or reject an offer as it pleased and no contract resulted until an offer was accepted. Hence, an unsuccessful bidder cannot recover the profit he would have made out of the contract, because he had no contract.

"But this is not to say that he may not recover the expense to which he was put in preparing his bid.

"It was an implied condition of the request for offers that each of them would be honestly considered and that that offer which in the honest opinion of the contracting officer was most advantageous to the Government would be accepted. No person would have bid at all if he had known that 'the cards were stacked against him.' No bidder would have put out \$7,000 in preparing its bid as plaintiff says it did, if it had known the Ordnance Department had already determined to give the contract to the Weidenhoff Company. It would not have put in a bid unless it thought it was to be honestly considered. It had

a right to think it would be. The Ordnance Department impliedly promised plaintiff it would be. This is what induced it to spend its money to prepare its bid.

“The OTAC knew it would involve considerable expense to prepare models, photographs, diagrams and specifications and other things necessary to comply with the invitation, and so, when it invited plaintiff to incur this expense, it must necessarily be implied that it promised to give fair and impartial consideration to its bid, having in mind only the interest of the Government and not the interest of some favorite bidder.

“That promise was broken, shamefully broken, if plaintiff’s petition states the facts. If the facts there stated are true, the conclusion seems inescapable that the Ordnance Department knew from the beginning they were going to give Weidenoff the contract. *The advertisement for bids was a sham, done only to appear to comply with the law, to clothe their apparently dishonest purpose with the habiliments of legality.* If these allegations are true, they practiced a fraud on plaintiff and on all other innocent bidders. They induced them to spend their money to prepare their bids on the false representation that their bids would be honestly considered.

“This implied contract has been broken, and plaintiff may maintain an action for damages for its breach.” [Emphasis added]

Although there was no contract for materials until the bid was accepted, there was a collateral implied contract that all bids would be given fair consideration.

In *Keco Industries v. United States*, 428 F.2d 1233, 192 Ct.Cl. 773 (1970), an unsuccessful bidder

brought an action against the government. The court denied defendant's motion for summary judgment, holding that a bidder who can make a prima facie showing of arbitrary and capricious action on the part of the Government has standing to sue, and may recover the costs of preparing his bid upon proof of such action.

Referring to the *Heyer* case, the court found that its holding was not intended to be limited to situations involving intentional fraud. The court said:

"Instead we find that Heyer stated a broad general rule which is that every bidder has the right to have his bid honestly considered by the government, and if this obligation is breached, then the injured party has the right to come into court to try and prove his cause of action." 428 F.2d 1233, 1237.

The court in *Armstrong & Armstrong, Inc. v. United States*, 356 F.Supp. 514 (D.C.E.D. Wash. 1973) adopted the Court of Claims rule:

"In actions for damages allegedly incurred because of arbitrary or capricious or otherwise unlawful acts or omissions by administrative agency procurement officials the Court of Claims has evolved a rule that applies to all procurement situations. This is, each request for offers to contract with the federal government have as an implied condition that each offer received will be fairly and honestly considered. When a prima facie case of arbitrariness or capriciousness has been established, a claimant will be allowed to present nonfrivolous claims."

In *Continental Business Enterprises, Inc. v. United States*, 452 F.2d 1016 (Ct.Cl. 1971), the court denied

a motion for summary judgment, finding that there was a sufficient factual dispute to raise an inference of arbitrary and capricious action on the part of the Government.

After recognizing the heavy burden of proof which the plaintiff must meet, the court said:

“Our decision in *Keco* was premised at least in part on the feeling that aggrieved bidders have the right to require the Government to enforce the statutes and regulations fairly and honestly, either by seeking equitable relief in the Federal district courts or by suing for money damages here.

“In requesting that we reconsider our holding in *Keco*, defendant asserts that permitting suits such as the present one could create serious problems in maintaining a smooth and effective procurement system. We have not been told what these problems will be, but we doubt that our holding today will jeopardize the procurement process. Certainly, a suit for damages in this court after the completion of the contract will not disrupt the procurement process as much as an injunction issued before the contract is awarded. *M. Steinthal & Co. v. Seamans*, supra. Moreover, the standard of proof which we require in cases such as this will undoubtedly discourage frivolous lawsuits and we do not think that contracting officers will feel intimidated or harassed by a ruling which requires their agencies to pay damages to a contractor when it is established that he has sustained a loss as a result of arbitrary and capricious action by the procurement officials.”

The statute referred to in *Heyer*, provided that all bids might be rejected, hence the solicitation of bids was not a promise to accept the lowest or best bid.

But we are talking about two different contracts. The promise to give fair consideration—the promise that competitive bids are indeed being sought—is not affected by such a statute; and the promise is supported by consideration: the bidder's time, effort, and expense in preparing the bid.

Referring to the statutory right to reject any or all bids, 10 *McQuillin, Municipal Corporations* (1966 Rev.) §29.77 states:

“In exercising the power to reject any or all bids, and preceeding anew with the awarding of the contract, *the officers cannot act arbitrarily or capriciously* but must observe good faith and accord to all bidders just consideration, thus avoiding favortism, abuse of discretion, or corruption. Even where the right to reject any and all bids is properly reserved, the bidding law may not be evaded under the color of a rejection. Although the courts generally will not disturb an honest exercise of discretion, it has been said that they will intervene to prevent the arbitrary rejection of a bid when its effect is to defeat the object to be attained by competition.” [Emphasis added]

The *Heyer* case recognizes that the implied contract to give fair consideration to all bids does not rest upon the statutory obligation to award a contract to the bidder whose bid is most advantageous to the government. The gravamen of the court's opinion is that it is *the act of advertising for bids* which creates the obligation to give fair

and impartial consideration, rather than the statutory duty to award the contract to the best bidder.

II

A CITY MAY BE BOUND BY AN IMPLIED CONTRACT.

In the court below, Salt Lake City contended that there can be no implied contract with it without compliance with statutory formalities, relying upon §24-1-15 Revised Ordinances of Salt Lake City, which in pertinent part reads as follows:

“ . . . that no liability against Salt Lake City in excess of one hundred fifty dollars shall be created by the commissioner of any statutory department without the sanction of the board of commissioners first had and approved . . . except as herein provided, no person shall create any liability against the City.”

But in this case, presumably, the advertising for bids was approved by the board; and it is that act that gives rise to the implied contract.

In 63 C.J.S., *Municipal Corporations*, §975, it is said:

“Notwithstanding some broad judicial statements that a municipal corporation cannot be made liable as can private individuals, in relations quasi ex contractu, and the principles of law regarding an implied contract arising from the rendition of services or quantum meruit are without application in dealing with municipalities, *it is generally considered that a municipal corpora-*

tion may become liable on an implied contract within the scope of its corporate powers, where the contract is deduced by inference from corporate acts, without note, deed, or writing, or is a quasi contract or contract implied in law.

* * *

“Recovery on an implied contract has been allowed in cases of informal renewals of intra vires contracts, and in cases of intra vires contracts which are invalidated by the illegality of the consideration therefor, or by defects or irregularities in the making or execution of the contract, such as failure to comply with constitutional, charter, or statutory requirements.”

* * *

“It is not always necessary to recovery that benefits shall have been received; *recovery in the case of a contract set aside for irregularity may be had for reasonable cost and expense incurred in the prosecution of the contract before it became the subject of attack irrespective of any benefit derived therefrom.*”

In 10 McQuillan, *Municipal Corporation* (1966 Rev.) §29.112, it is stated:

“There is considerable authority however, to support the rule that a recovery may be allowed in such cases [where statutes prescribing the method of binding a municipality by contract have not been complied with] upon the theory that it is not justice, where a contract is entered into between a municipality and another, in good faith, and the corporation has received benefits thereunder, to permit the municipality to retain the benefits without paying the reasonable value

therefor, the same as a private corporation or individual would have to do. * * *

That a municipality in the State of Utah may be bound by an implied contract is established in *Salt Lake City v. State*, 22 U.2d 37, 448 P.2d 350 (1968), in which the court found that the conduct of the parties evidenced a contract between Salt Lake City and the Territory for the City to provide free water to the territory in consideration of its locating the State Capitol in Salt Lake City.

There apparently was no integrated agreement to provide water, but the court implied such an agreement from the conduct of the parties:

“The actual agreements reached by and between the two bodies politic must be determined from a consideration of all of the documents available together with the understanding of the parties as was manifested by what was done in connection therewith.” 448 P.2d 350, 355.

The implied contract was enforced in spite of §1774, Compiled Laws of Utah 1888, vol. I, which provided that the city recorder:

“. . . shall countersign all contracts made in behalf of the city, and every contract made in behalf of the city or to which the city is a party shall be void unless signed by the recorder.”

CONCLUSION

The right of unsuccessful bidders to maintain an action to recover the costs of preparing their bids in

instances where there is a showing of arbitrariness and capriciousness in the advertising for, and in the consideration of bids, has been recently recognized and is gaining support.

In a time when integrity in government is coming under severe scrutiny it is incumbent upon the judiciary to guard against governmental, as well as private lawlessness. If the lower court's decision is left to stand, the effect will be that any governmental agency may, at time, enter into secret agreements with favorite bidders, thereby determining in advance the outcome of what appears to be competitive bidding, but is in fact, mere artifice and pretense.

The case of *Thatcher Chemical Co. v. Salt Lake City Corporation*, 21 U.2d 355, 445 P.2d 769 (1968), perhaps best sums up the dangers which exist when competitive bidding is made a sham as in the case at bar.

“The purpose of the system of competitive bidding tends to invite competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts, and to secure the best work or supplies at the lowest price practicable, and such a system is designed for the benefit of the citizens and taxpayers and the public interest generally.”

The public interest, referred to in *Thatcher*, can best be vindicated in cases such as the one at bar by holding, as in *Curtiss-Wright Corporation v. McLucas*, 364 F.Supp. 750 (D.C.N.J. 1973), that plaintiff shall have standing to advance the public interest as a private attorney general.

It is admitted in the pleadings that the Marriott subsidiary, Airline Foods Incorporated, was obligated by a "Lease and Concession Agreement" with Salt Lake City to absorb the cost of the in-flight kitchen in any sum by which it exceeded \$550,000. If plaintiff's contentions are true that the City estimated the project's cost at \$650,000 and the Marriott subsidiary, J.J.G. Construction Company, submitted a bid of \$540,000.00, the implication is almost irresistible that Marriott's bid was based solely upon its contractual liability in the lease and concession agreement rather than upon any estimated cost.

And if, as the plaintiff contends, Salt Lake City failed to disclose the fact of the above agreement to prospective bidders, thereby giving warning of Marriott's competitive advantage, the inference that the outcome of the bidding was all but predetermined is likewise irresistible.

These are facts which the plaintiff seeks to litigate in the trial court. Upon the basis of the authority herein set forth, he should be afforded that opportunity.

Respectfully submitted,

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